Aziana bt Uda Bahari v Gan Kong You

HIGH COURT (JOHOR BAHRU) — ORIGINATING MOTION NO 17–18 OF 2008
KAMARDIN HASHIM JC
3 MARCH 2009

Legal Profession — Professional discipline — Misconduct — Investigating tribunal found no substantiation of allegations — Disciplinary Board however found applicant guilty of misconduct — Whether conduct of applicant unbefitting of an advocate and solicitor — Whether conduct brought or was calculated to bring legal profession into disrepute — Whether dishonest intention established — Whether Disciplinary Board bound by recommendation of investigating tribunal

The applicant was appealing against the order made by the advocates and solicitors disciplinary board ('DB') which found misconduct on her part and had imposed a penalty of RM500 payable to the Discipline Fund. The applicant was subject to suspension from practicing law pursuant to s 103(3) of the Legal Profession Act 1976 ('Act') unless the said fine was paid within the period stipulated. The proceeding arose out of a letter of complaint to the DB by the complainant/respondent relating to a tenancy agreement under which a writ of distress was executed by the landlord against the complainant/respondent. The investigating tribunal comprising of three members found that there was no substantiation of the allegations of misconduct and accordingly held that no formal investigating was required. However, the DB, comprising of 16 members, unanimously found misconduct on the part of the applicant and imposed the said penalty. The board was not satisfied with the applicant's explanation for rejecting the cheque from the complainant as settlement unless their legal fee and costs of employing security guards was made; and the fact that she had banked in the cheque thereafter as she was of the view that it was for the best interest of her client. The applicant contended, inter alia, that as the investigating tribunal had found as a fact that the real grouses of the complainant were against the action of the guards employed, there was no basis for the DB to disagree with this finding of the tribunal. Further, there were no reasons given why the DB departed from this finding. The applicant also submitted that there was no intention on her part either to misappropriate the cheque or defraud the respondent or with any other dishonest intention.

Held, dismissing the applicant's appeal with costs:

(1) It was the duty of the DB to decide whether the conduct of the applicant was unbefitting of an advocate and solicitor or which brought or was calculated to bring the legal profession into disrepute. The court should be very slow in interfering with what had been decided by the DB except in a very exceptional case only (see para 16).

(2) Based on the complaint, the applicant's explanation and the report from the investigating tribunal, the DB found misconduct on the applicant's part particularly when she banked in the cheque after having rejected the same as settlement earlier. After perusing the records, the court had no ground to disagree with the DB decision (see para 19).

(3) In deciding whether an advocates and solicitors is guilty for professional misconduct, both the Bar Council and the DB are required to balance the interest of the applicant with the interest of the public at large as well as the interest of the legal profession. Both the Bar Council and the DB owe a duty to protect and safeguard members of the public by maintaining a high standard of conduct amongst legal practitioners (see para 19).

(4) Dishonesty may be inferred from the surrounding circumstances and to establish dishonest, therefore, it was not necessary that there was an intention to retain the cheque permanently. On the facts, the applicant's action in rejecting the cheque as a settlement and later banking-in the same showed dishonest conduct on her part. She should not keep the cheque and banked-in later instead she should have returned the cheque to the complainant/respondent. The applicant was acting not in accordance to the standards of reasonable and honest counsel in that situation (see para 21).

[Bahasa Malaysia summary

Pemohon merayu terhadap perintah oleh badan disiplin peguambela dan peguamcara ('BD') setelah mendapati salah laku pemohon dan telah mengenakan denda sebanyak RM500 yang perlu dibayar kepada tabung disiplin. Pemohon juga digantung daripada mengamalkan undang-undang berikutan dengan s 103(3) Akta Profesion Undang-Undang 1976 ('Akta tersebut'), melainkan jika denda itu dibayar dalam masa yang ditetapkan. Prosiding itu berbangkit daripada surat aduan yang dikirim kepada BD oleh pengadu/responden berkaitan dengan penjanjian sewaan yang mana suatu writ distres telah dikeluarkan oleh tuan rumah terhadap pengadu/responden. tribunal siasatan yang terdiri daripada tiga orang mendapati tiada pengesahan berkaitan dakwaan salah laku tersebut dan dengan itu memutuskan bahawa tiada siasatan perlu dijalankan. Tetapi, BD yang terdiri daripada 16 orang

memutuskan sebulat suara wujudnya salah laku di pihak pemohon dan mengenakan denda tersebut. Badan tersebut tidak berpuas hati terhadap penjelasan pemohon berkenaan penolakan cek daripada pengadu sebagai bayaran kepada tuntutan writ tersebut, kecuali jika yuran guaman dan kos mengupah pengawal itu juga dibuat; dan juga dia telah memasukkan ke dalam bank cek tersebut kerana dia berpendapat bahawa ia adalah untuk menjaga kepentingan anak guamnya. Pemohon menghujah, antara lain bahawa tribunal siasatan telah mendapati bahawa sungutan sebenar pengadu adalah terhadap tindak tanduk pengawal yang diupah, tiada alasan mengapa BD harus tidak bersetuju dengan penemuan tribunal tersebut. Selanjutnya, tiada alasan diberikan mengapa penemuan BD itu menyimpang daripada yang asal. Pemohon juga menyatakan bahawa tiada niat di pihaknya sama ada untuk menyalahguna cek atau melakukan fraud terhadap responden atau mempunyai lain-lain niat buruk.

Diputuskan, menolak rayuan pemohon dengan kos:

(1) Adalah menjadi tugas BD untuk memutuskan sama ada tindakan pemohon mencemarkan profesion peguambela dan peguamcara atau mendatangkan atau mungkin menyebabkan nama buruk terhadap profesion tersebut. Mahkamah seharusnya berhati-hati untuk campurtangan dalam keputusan yang telah dibuat oleh BD kecuali dalam kes-kes luar biasa sahaja (lihat perenggan 16).

(2) Berdasarkan pengaduan, penjelasan pemohon dan laporan tribunal, BD mendapati berlakunya salah laku di pihak pemohon terutamanya apabila dia memasukkan cek tersebut ke dalam bank setelah dia menolak cek tersebut sebagai pembayaran untuk tuntutan writ tersebut. Setelah meneliti laporan-laporan, mahkamah tiada alasan untuk bercanggah pendapat dengan keputusan BD (lihat perenggan 19).

(3) Dalam menentukan sama ada seseorang peguambela dan peguamcara bersalah atas salah laku profesional, kedua-dua majlis peguam dan BD dikehendaki mengimbangi antara kepentingan awam secara umumnya, dan juga kepentingan profesion undang-undang. Majlis peguam dan BD berkewajipan melindungi dan menjaga orang awam dengan mengekalkan standard tatacara yang tinggi di kalangan pengamal undang-undang (lihat perenggan 19).

(4) Ketidakjujuran boleh dilihat dalam keadaan keseluruhan kes, dan untuk mengesahkan ketidakjujuran ini, tidak perlu ada niat untuk menyimpan cek tersebut selama-lamanya. Melalui fakta-fakta, tindakan pemohon dalam menolak cek tersebut sebagai bayaran penyelesaian atas tuntutan writ tersebut dan kemudiannya memasukkan ke dalam bank cek yang sama, menunjukkan ketidakjujuran dalam perlakuannya. Dia

tidak sepatutnya menyimpan dan kemudian memasukkan cek tersebut ke dalam bank, tetapi dia haruslah memulangkan cek tersebut kepada pengadu/responden. Pemohon, sebagai seorang peguam, tidak bertindak sewajarnya dan sejujurnya (lihat perenggan 21).]

Notes

For cases on misconduct, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1844–1916

Cases referred to

An Advocate & Solicitor, Re [1950] MLJ 113, HC (folld)
Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89; [1980] 1 LNS 4, FC (refd)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341, CA (refd)
Marzaini Zainuddin v Majlis Peguam Malaysia [2007] 8 MLJ 697; [2008] 10 CLJ 339, HC (refd)
R v Ghosh [1982] All ER 689, QBD (refd)
Wong Juan Swee v Law Society of Singapore [1994] 3 SLR 846, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(2), (3), 101(4)(a), 102, 103(1), (3), 103E, 108
Penal Code s 24

CH Ng (Ng Fan & Associates) for the applicant.
Wong Kim Fatt (Gulam & Wong) for the respondent.

Kamardin Hashim JC:

[1] This is an application (encl 2) by way of appeal under s 103E of the Legal Profession Act 1976 ('the Act') by the applicant herein against the order dated 16 May 2008 of the advocates and solicitors disciplinary board ('DB') ordering the applicant to pay a penalty of RM500 under s 103(3) of the Act. The applicant applies to this court to set aside the order of the DB.

BACKGROUND FACTS

[2] These proceedings arose out of a letter of complaint to the DB, signed by the complainant/respondent dated 18 May 2004. The complain relates to a tenancy agreement dated 1 February 1985 under which a writ of distress was executed by the landlord against the complainant/respondent. The applicant, in the legal firm of M/S CL Boo and Associates, was at the material time acting for the landlord. The complainant/respondent's letter of complaint reads as follows:

GAN KONG YOU

(NRIC No. 520319-04-5139)

62A, (Tingkat 1) Jalan Penggaram

83000 Batu Pahat

Date: 18th May 2004

BERDAFTAR A.R

Lembaga Tatatertib Peguam-Peguam

Advocates & Solicitors' Disciplinary Board

8th & 9th Floor, Wisma Maran

28, Medan Pasar

50050 Kuala Lumpur

Dear Sir,

Re: Complaint against CIK AZIANA BINTI UDA BAHARI (NRIC No. 740610-08-6360) Advocate & Solicitor

With reference to the above I wish to lodge a complaint against the above named person as follows:-

1. I was the yearly tenant of the premises known as No. 43, Jalan Rajawali, Kampung Merdeka, 83000 Batu Pahat, Johor ('the said Premises') at a yearly rent of RM2,640.00 payable in arrears. The tenancy commenced on 1-1-1991 and continues to date.

2. On or around 4-4-2003 I received a letter dated 4-4-2003 from M/S. C.L. Boo & Associates of No. 17, Ground Floor, Lorong Yayasan, 86000 Kluang ('Landlord's Solicitors') claiming a sum of RM3,600.00 as being the arrears of rental of the said Premises from April 2002 to April 2003 allegedly owing by me to my Landlord Mr. S. Sigamoney I had on 18-4-2003 through M/S. T.K. Lim & Co. of Batu Pahat ('my Solicitors') forwarded to the Landlord's Solicitors a cheque drawn on MBB No. 935454 for RM1,320.00 dated 18-4-2003 being payment of the balance of the yearly rental for the period from 1-1-2002 to 31-12-2002. This said cheque was returned by the Landlord's Solicitors on 24-4-2003. (I enclose a copy of the Landlord's Solicitors letter dated 4-4-2003, my Solicitors' letter dated 18-4-2003 and the Landlord's Solicitors' letter dated 24-4-2003 for your reference).

3. On 20-1-2004 a Writ of distress was issued by the Batu Pahat Magistrate's Court under Distress No. 2/2004 for the sum of RM3,600.00 being the alleged arrears of rental for the period from July 2002 to Jun 2003 and on 29-4-2004 one Cik Aziana Binti Uda

Bahari from the Landlord's Solicitors came to my house and directed the Court Bailiff to seize my properties. There wasn't any security guard appointed by the Landlord's Solicitors during the period from 29-4-2004 to 13-5-2004. (I enclosed herewith a photocopy of the Writ of Distress dated 20-1-2004 and the Notice of Seizure of Sale dated 29-4-2004).

4. I had on 6-5-2004 forwarded to the Landlord's Solicitors by courier service a banker's cheque MBB No. 108927 dated 6-5-2004 for the sum of RM3,600.00 being payment of the amount claimed in the said Notice of Seizure and Sale.

5. On 11-5-2004 I received a faxed copy of a letter dated 7-5-2004 from the Landlord's Solicitors refusing to accept my banker's cheque for RM3,600.00 unless I pay to the Landlord's Solicitors the Landlord's lawyers fee of RM2,649.00 and the security guards costs for RM1,344.00.

6. I have vehemently protested against this 'extortionate' demand since the Notice of Seizure and Sale dated 29-4-2004 requires me to pay RM3,600.00 only.

7. On 13-5-2004 the said Cik Aziana binti Uda Bahari together with the Court Bailiff came to my house to carry out the sale of my properties. Cik Aziana binti Uda Bahari stated that she will direct the Bailiff to call off the auction only if I agree and pay to the Landlord. Solicitors the sum of RM2,649.00 being legal fees and disbursements which by right is to be paid by the landlord and a further sum of RM1,344.00 being costs for security services for the execution proceeding. I refused to agree and pay the sum of RM2,649.00 as it amounted to an extortion by threatening to use legal proceeding to unlawfully demand for monies which I am not supposed to pay. Further since the security guard were appointed on demand for the sum of RM1,344.00 as security guard fees was an attempt to cheat me and to extort money from me by threatening to use legal proceeding to unlawfully demand monies which is not payable. The Court Bailiff proceeded to auction off my properties under her directions. I enclose herewith photocopies of the Landlord's Solicitors' letter dated 7-5-2004 demanding the said payment of RM3,993.00 and bill.

Yours faithfully,

sgd

GAN KONG YOU

[3] Letter of complaint was forwarded to the applicant and she was asked

to furnish her written explanation to the DB within 14 days as required under s 101(4)(a) the Act. The letter of explanation dated 26 June 2004 from the applicant reads as follows:

> Your Ref: Exp/1006/20/Liz.
>
> Date: 26th June, 2004
>
> LEMBAGA TATATERTIB PEGUAM-PEGUAM (ADVOCATES & SOLICITORS'DISCIPLINARY BOARD)
>
> 8th & 9th Floor, Wisma Maran
>
> 28 Medan Pasar
>
> 50050 Kuala
>
> Lumpur
>
> Dear Sirs/Madam,
>
> Re: Complaint No: DB/04/0252
>
> Complaint: Gan Kong You
>
> Respondent: Aziana binti Uda Bahari
>
> I refer to your letter dated 10th June, 2004 which I received on 16th June, 2004.
>
> 1. By Tenancy Agreement dated 1st February, 1985, our client, Mr. Sigamoney (hereinafter referred as 'the Landlord') agreed to let the premises known as No. 43, Jalan Rajawali, 83000 Batu Pahat, Johor Darul Takzim to Mr. Gan kong You (hereinafter referred to as 'the Tenant') with monthly rental of RM300.00 for a minimum period of one year, which means that the Tenancy expired on 31st January 1986. We denied that the Tenancy was for yearly rent of RM2,640.00 payable in arrears. Enclosed herewith a copy of the Tenancy Agreement for your reference. Paragraph 1 of the Tenancy Agreement clearly stated that the Landlord agree to let the premises with the monthly rental of RM300.00 subject to the stipulations and agreements hereinafter stated the said premises as a monthly rental. Paragraph 3 (ii) of The Tenancy Agreement stated that the Tenancy was for a minimum period of one year.
>
> 2. On 4th April, 2003 our client, 'the Landlord' came to the office with the instruction to send a Notice to Quit and Vacant Possession and to demand arrears of rental for the month of April 2002 to April, 2003 together with rental for the month of May, 2003. However, after sending the Notice, our client informed me the actual rental in arrears was for the month of July, 2002 to April, 2003. As such, we wrote another Notice to Quit and Vacant Possession and to demand arrears of rental for the month of July, 2002 to April, 2003 together with the rental for the month of May, 2003.

I received a reply from Messrs T.K. Lim and Co. on 22nd April, 2003, enclosing the MBB cheque No. 935454 for the sum of RM1,320.00 and inter alia stated that the Tenancy was a yearly tenancy. I replied to the letter with the instruction from 'the Landlord'not to accept the payment because the arrears of the rental was for the sum of RM3,300.00 (July 2002 to May 2003 — 11 months c RM300.00) and returned the cheque and inquired whether Messrs. T.K. Lim & Co. will accept the Notice to Quit dated 24th April, 2003 on behalf of 'the Tenant'. On 22nd May, 2003, Messrs T.K. Lim & co. replied to our letter and stated that the Tenancy was a yearly basis tenancy and they have no instructions to accept service on behalf of 'the Tenant'.

As such, since the Notice dated 24th April, 2003 had expired and Messrs T.K. Lim & Co. did not have instructions to accept service on behalf of 'the Tenant', we had by our letter dated 2nd June, 2004 sent another notice to Quit and Vacant Possession and to demand arrears of rental for the month of July 2002 to May, 2003 together with rental for the month of June, 2003 for the sum of RM3,600.00.

3. On 17th October, 2003, we obtained Order for Distress vide Batu pahat Magistrate Court Originating Application No. 74-24-2003 (a copy of the Order is enclosed herewith for reference). In the Clause 3 of the Order it was stated that the costs of the Application will be paid by the Defendant. We also obtained a Writ of Distress No. 2/2004 (a copy of the Writ of Distress is enclosed herewith for your reference). In the Writ of Distress it is stated that the Defendant have to pay to the Plaintiff, RM3,600.00 for being the arrears of rental and the costs for execution.

The Batu Pahat Magistrate Court by their letter dated 21st April, 2004 requested that we appoint a Security Guard for the purpose of execution on 29th April, 2004. Enclosed herewith a copy of the letter dated 21th April, 2004.

We had on 22nd April, 2004 appointed Syarikat Perkhidmatan Keselamatan Pahlawan (M) Sdn. Bhd. (enclosed herewith a copy of the letter)

The Writ of Distress was executed on 29th Arpil, 2004 at 2.30 p.m. and the court had given 'the Tenant' 14 days to pay the arrears of rental together with all the costs and expenses incurred therein.

'The Tenant' had sent to us a Bankers Cheque MBB No. 108927 dated 6th May, 2004 purportedly being the full and final settlement of the matter. I had then faxed a letter dated 7th May, 2004 to 'the Tenant' who was then at our Batu Pahat office and he had duly acknowledged of the same (enclosed herewith a copy of the duly acknowledged letter). Thereafter, no responds from the Tenant until the Auction date.

On 13th May, 2004, I personally attended the Auction, and returned the Cheque but 'the Tenant' refused to accept it.

The main complaint from Mr. Gan Kong You (the Tenant) is regarding the legal fees and the Security Guard costs, but we have obtained the Order and the Writ of Distress which allowed my client ('the Tenant') to claim from him accordingly.

We enclosed herewith the Bill from Syarikat Perkhidmatan Keselamatan Pahlawan (M) Sdn. Bhd. and our Legal Bills which 'the Landlord' entitled to claim from 'the Tenant' by the Order dated 17th October, 2003 and Writ of Distress dated 20th January, 2004. We also enclosed herewith a copy of 'Notis Jualan' issued by the Batu Pahat Magistrate Court stating that the auction will be held on 29th April, 2004 unless the amount levied together with the costs is paid.

As for 'the Tenant' complaint regarding the Security Guard, we enclosed herewith a letter dated 14th May, 2004 the contents which is self-explanatory for the reference.

Lastly, I denied that I was trying to extort from the Tenant the Legal Fees and Disbursements because I was only carrying out my duty as Solicitors to my client/the Landlord.

Thank you.

Yours faithfully,

Sgd

(AZIANA BINTI UDA BAHARI)

[4] The complainant/respondent wrote another complaint letter dated 4 August 2008, a purported reply to the applicant's letter of reply to the DB, the contents are as follows:

Your Ref: Exp/1507/10/Liz.

GAN KONG YOU

YOU (NRICNo. 520319-04-5139)

39, Jalan Perdana Taman Bukit Perdana

83000 BATU PAHAT

Date: 4th August 2004

REGISTERED

LEMBAGA TATATERTIB PEGUAM-PEGUAM ADVOCATES & SOLICITORS'DISCIPLINARY BOARD

8th & 9th Floor, Wisma Maran

28 Medan Pasar

50050 Kuala Lumpur

Dear Sir,

Re: Complaint No.: DB/04/0252

Complaint: Gan Kong You

respondent: Aziana binti Uda Bahari

I refer to your letter dated 15-7-2004 enclosing a copy of the respondent's explanation and enclosures.

I wish to say that I am totally dissatisfied with the respondent's explanation and say that she is being untruthful in her explanation.

I say that the respondent's conduct ir this episode is UNBECOMING OF A LAWYER:

(a) She has wrongly and deliberately misrepresented the facts of the case of the Magistrate when she applied for the writ of distress.

(b) She has abused the powers of the Court by asking for costs.

(c) She has deliberately refused to accept the sum of RM3,600 which I tendered on 6-5-2004 in accordance with the Form 85 dated 29-4-2004 issued to me by the Baliff of the Batu Pahat Magistrate's Court (See Enclosurel) and compounded by threatening me with her statement that my distrained goods will be sold by public auction in front of my neighbours unless in addition to the sum of RM3,600 already tendered I paid a further sum of RM7,293 (being alleged arrears of rental from July 2003 to May 2004 not covered under the distress writ, her Solicitor and client's cost of RM1,155.00, RM1,344 being guards' wages, RM1,00 being refundable deposit paid by her client to the Court as expenses for execution, RM300 being her attendance charge in court and RM194 being swearing and filing fees). This I say is extortion, since the said sum of RM7,293 is not payable by me under the Writ of Distress. The Respondent is lying when she says that 'Notis Jualan issued by the Batu Pahat Magistrates Court stating that the auction will be held on 29th April 2004 unless the amount levied together with the costs is paid'. The Enclosure I clearly required me only to pay RM3,600 within 7 days. Under Section 18 of the Distress Act 1951 any costs incurred in any distress proceedings is in the discretion of the Judge and therefore I am of the view that the Respondent did not bring this section to the attention of the Magistrate when she applied for a writ of distress. Further Order 48 Rule 19 of the Rules of the Subordinate Court only provides the method of assessing costs in *contested* applications. There is no provision for cost in uncontested applications. The Respondent cannot charge costs to me without the Judge agreeing.

(d) The value of the goods seized was estimated at RM1,500 and I do not see any reason as to why it could not be removed to the Magistrates

Court for safe keeping. The Borang 85 (Enclosure 1) says the guards wages are RM48 per day but the respondent had engaged guards whose wages were at RM96 per day. The guards wages for 14 days following the Court's scale is RM672 and following the respondent's Scale is RM1,344. There is no good reason to employs guards for RM1,344 to look after goods valued at RM1,500. There is also something fishy about employing guards in Kluang (about 35 KM away) to come to Batu Pahat. It will be cheaper to take local people in Batu Pahat. I believe that the Respondent had ulterior motives.

The goods distrained were left my possession in the house which I was occupying and I personally know that there were no permanent 24 hour guards. On one or two occasions a Malay couple will come around the house and leave immediately without even entering the house to inspect the goods. On 12.4.2004, this couple and another male Malay came to the house in a four wheel vehicle and took away the aquarium with fish (listed in the Inventory) and my potted plants (not listed in the Inventory).

(e) On 12-4-2004 after the auction of the distrained goods, the Respondent evicted me and my family out of the house and locked up the house. I have been given to understand that a distress action is a remedy available to Landlord to recover arrears of rent AND NOT TO RECOVER POSSESSION. The Respondent has used unlawful tactics to recover possession.

(f) The Respondent was notified of my position as a yearly tenant of the house and as a consequence the Respondent had decided to bring legal proceedings against me and asked my former lawyers as to whether they has instructions to accept service. However, since I could not afford the asking fees of my former lawyers they replied to the Respondent that they had no instruction to accept service.

It was from this time that the respondent knowing I had no lawyers abandoned all its intention of suing me and used underhand and devious method and tactics to get me out of the house. The Tenancy Agreement in writing dated 1-2-1985 had no fixed period but it was agreed that it will be for a minimum term of 1 year and the tenancy was a monthly tenancy and the monthly rental was RM300.00. The tenancy under this Agreement ended on 31-12-1987.

Around December, 1987 a new oral monthly tenancy of a monthly rent of RM250 was agreed to between my Landlord and myself to take effect from 1-1-1988. Hence the Tenancy Agreement dated 1.2.1985 had expired and superceded by this oral monthly tenancy. As evidence I enclose herewith selected photocopies of receipts issued in respect of monthly rent for the month of:

(1) December 1987 when the monthly rent was RM250.00;

(2) January 1988 when the monthly rent was RM250.00

(3) December 1991 when the monthly rent was RM200.00

Around June 1992 a new oral yearly tenancy at a yearly rent of RM1,640 payable in arrears was agreed to between the Landlord and myself and to be effective from 1-1-1992. Hence the oral monthly tenancy from 1-1-1988 to 31-12-1991 had been superceded by a yearly tenancy. As evidence I enclose herewith selected photocopies of receipts issued in respect of the yearly rent for:

(i) 1992;

(ii) 1995;

(iii) 1998; and

(iv) 2001.

I also enclose herewith photocopy of the receipt for the sum of RM 1,320.00 which I paid to the Landlord on 12-10-2002 as advance part payment of the yearly rent of RM2,640 for the year 2002.

Your will therefore see from these receipts that I am telling the truth and when my former lawyer wrote to the respondent and stated the actual facts she could easily verify it from the respondent. In paragraph 2 of her explanation she has conveniently stated that the Landlord has alleged the rental is RM300 per month. I do not believe that my Landlord, a retired headmaster and a decorated teacher, would have said so. The respondent was reckless and did not even try to seek the truth which I believe every lawyer should do.

Finally could the Board obtain for me the services of a lawyer in Kuala Lumpur to represent me in my complaint? I cannot afford a lawyer but I want to have justice.

Yours faithfully,

sgd

(GAN KONG YOU)

[5] The report of the three members in the investigating tribunal dated 8 January 2008 found no misconduct on the part of the applicant and recommended that a formal investigation was not necessary. The report reads as follows:

REPORT OF THE INVESTIGATION TRIBUNAL SET UP TO HEAR A COMPLAINT AGAINST CIK AZIANA BINTI UDA BAHARI LODGED BY MR. GAN KONG YOU

Date: 8m January 2008

Time: 2.30 p.m.

Venue: Meeting Room

Tea Kelvin Kang & Company

Advocates & Solicitors

Suite 8.1, Level 8,

Menara Pelangi Jalan Kuning, Taman Pelangi

80400 Johor Bahru

This is a complaint which was lodged by the Complainant, one Gan Kong You ('the Complainant') against Aziana binti Uda Bahari ('the Respondent').

The Investigating Tribunal fixed the hearing date for the complaint on 8th January 2008. The Complainant attended the hearing, so did the Respondent together with her Counsel, Mr. C H Ng. The complainant did not call any witnesses.

From the outset, we asked the Complainant who prepared the letter of complaint and if he understood the contents therein. We were informed that the letter of complaint was prepared by a legal clerk from the firm of M/s T K Lim & Co., Batu Pahat and that he does not understand the contents of the said letter although he signed it. I then explained the contents of the letter of complaint to the Complainant in the Hokkien dialect and asked if he agreed with the contents as translated. He replied in the affirmative.

From our enquiries, we were able to ascertain the following:

1) A Notice of Seizure and Sale dated 29th April, 2004, was issued out of the Magistrate's Court Batu Pahat and posted on the demised premises.

2) The amount payable under the Notice of Seizure and Sale was RM3,600.00 excluding costs.

3) On 6th May, 2004, the Complainant sent by courier a Banker's Cheque for the sum of RM3,600.00 being purported settlement of the amount claimed by the Respondent's client. The Banker's Cheque was received the following day and though tendered, was rejected by the Respondent acting on her client's instructions. This rejection was stated in the Respondent's letter to the complainant dated 7th May, 2004.

4) The auction of the distrained good was carried out on the 13th May, 2004, which netted a sale totaling only RM150.00.

5) The Respondent banked in the Complainant's Banker's Cheque on or about the 20th October, 2004, and has issued a receipt for it.

The main thrust of the complaint, as we understand it from the explanation given by the Complainant, is largely targeted at the conduct of the guards appointed by the Respondent's legal firm, upon the instructions of the Court. And the Respondent has no choice but to appoint only security guard companies registered with the approved by the Court. We were told by the Complainant of the atrocious conduct of the security guards and how various items of furniture, etc. belonging to the Respondent and found in

the demised premises were carted away by the said guards without authorization by anyone. The Complainant informed us that he even lodged a police report as regards this alleged conduct of the guards but nothing came out of it.

As regards the allegations of misconduct, we were unable to find any substantiation for the same and we feel that the Complainant's real grouses have been misdirected into the complaint into the complaint at hand.

In the circumstances, we recommend that a formal investigation is not necessary pursuant to Section 102(1)(a) of the Legal Professions Act.

Dated this 1st day February 2008.

sgd

LEE LIN JEE

(CHAIRMAN)

Investigating Tribunal

[6] The DB disagrees with the findings of the investigating tribunal, proceeded to gave notice under s 103(1) of the Act (pre-amendment) to hear the applicant further before DB to decide on the appropriate order. After considering report of the investigating tribunal and after hearing the applicant, DB unanimously found misconduct on the part of applicant whereby a penalty of RM500 was imposed. Decision of the DB is as follows:

IN THE MATTER OF A COMPLAINT BEFORE THE ADVOCATES AND SOLICITORS DISCIPLINARY BOARD

COMPLAINT NO. IT/04/0252

BETWEEN

GAN KONG YOU COMPLAINANT

AND

AZIANA BINTI UDA BAHARI RESPONDENT

LEGAL PROFESSION ACT 1976 ORDER UNDER SECTION 103

In exercise of the powers conferred by Section 102 of the Legal Profession Act 1976 (the Act), the Disciplinary Board on 16 May 2008 considered the Report made by the Investigating Tribunal on the complaint against the Respondent and upon hearing the Respondent, has ORDERED that the Respondent do pay a penalty of Ringgit Malaysia Five Hundred (RM500.00) payable to the Discipline fund, within one (1) month from the date of this Order, failing which the Respondent shall be suspended from practice as an Advocate and Solicitor pursuant to Section 103(3) of the Act until payment of the penalty.

Dated 16 May 2008

TAN SRI DATO' SERI KHALID AHMAD BIN SULAIMAN CHAIRMAN ADVOCATES & SOLICITORS DISCIPLINARY BOARD

THE APPLICANT'S SUBMISSION

[7] There are three grounds of appeals put up by the applicant. They can be summarised as follows:

(a) There is no merit in the complainant's complaint;

(b) There is no wrong doing for DB to impose penalty as there is no basis to support the imposition of the penalty by the DB; and

(c) There is no basis for the DB to disagree with the findings of the investigating tribunal.

[8] The applicant laid down particulars of events as follows:

1 February 1985	Tenancy agreement entered into between S Sigamoney (the landlord) and Gan Kong You, the complainant/respondent for letting of 43, Jalan Raja Wali, Kg Merdeka, Batu Pahat at a monthly rental of RM300.
4 April 2003	M/S CL Boo and Associates, acting for the landlord issued a letter of demand claiming for RM3900 (rental for period between April 2002 to May 2003)
18 April 2003	M/S TK Urn & Co acting for the respondent replied by stating that the tenancy is a yearly tenancy and that the rent is payable in arrears and no rent is due.
2 June 2003	M/S CL Boo and Associates acting for the landlord, issued a second letter of demand claiming for RM3600 (for the period between July 2002 to June 2003).
17 October 2003	M/S CL Boo and Associates, acting for the landlord, obtained an order from the Magistrate's Court at Batu Pahat to issue a writ of distress against the respondent for RM3600 and for costs.
20 January 2004	The writ of distress is issued by the registrar in Magistrate's Court of Batu Pahat for RM3600 together with costs and expenses.

21 April 2004	The registrar in the Sessions Court of Batu Pahat authorised M/S CL Boo and Associates to appoint a firm of security guards and to pay them directly.
22 April 2004	M/S CL Boo and Associates appointed Syarikat Perkhidmatan Keselamatan Pahlawan (M) Sdn Bhd as security guards from 29 April 2004.
29 April 2004	The bailiff executed the writ of distress and issued a 'Notis Penyitaran dan Penjualan', giving the respondent seven days to pay up and fixed the auction on 13 May 2004.
7 May 2004	M/S CL Boo and Associates received a letter dated 6 May 2004 from the respondent tendering a cheque for RM3600 as full and final payment of the distress action and without prejudice to his right to recompute the amount owing.
7 May 2004	M/S CL Boo and Associates wrote a letter to the respondent returning the said cheque and asked for payment of bill and costs of employing security guards.
7 May 2004	The registrar in Sessions Court, Batu Pahat issued the notice of sale to M/S CL Boo and Associates and the respondent. The respondent failed to comply with this notice.
13 May 2004	Bailiff auctioned off chattels seized.
14 May 2004	Letter from Syarikat Perkhidmatan Pahlawan (M) Sdn Bhd confirming that they had employed two security guards from 29 April 2004 to 13 May 2004 and bill dated 14 May 2004 for RM1,512 (for 15 days).
18 May 2004	The respondent lodged a complaint.
8 January 2008	The investigating tribunal conducted the hearing of the complaint.
1 February 2008	The investigating tribunal prepared its report on the complaint and stated that: (a) they were unable to find any substantiation for the allegations of misconduct; and (b) they recommended that a formal investigation was not necessary.

13 March 2008	Pursuant to s 103(1), the DB notified the applicant that though the complaint does not warrant a formal investigation by the disciplinary committee, the applicant should be ordered to pay a penalty.
15 May 2008	The DB heard the applicant.
16 May 2008	After hearing the applicant, the DB imposed a fine of RM500.

[9] The applicant argued that the execution done in the matter before the Batu Pahat court is valid. The allegation by the respondent that there was no guard employed is not correct as the appointment and payment of the security guard is authorised by the court. The applicant insisted that she had no personal interest in the matter and she only acted on the instructions of the landlord. She also stressed that her actions were merely to protect her clients interest. She submitted that there was no merits in the respondent's complaint thus prompted the investigating tribunal to conclude that there was no substantiation of the allegations of misconduct and no formal investigating is required. This court has no qualm about the applicant's arguments and the findings of the investigating tribunal at this stage.

[10] As regards to the second ground of the applicant's appeal, learned counsel submitted that it is wrong for the DB to impose fine when there was no finding of wrong doing therefore there is no basis to support the imposition of the penalty by the DB. The applicant also questioned the manner in which the DB conducted the inquiry. Even though she was given a two months notice to attend the hearing but she was not given any charges. The DB's letter dated 3 September 2008, informing her of the date for her to attend the inquiry did not even say under which provisions of the Legal Profession Act, 1976 or Regulations did the applicant contravene in order to find her guilty of misconduct.

[11] The final issue advanced by the applicant is that there is no basis for the DB to disagree with the findings of the investigating tribunal. As the investigating tribunal found as a fact that the real grouses of the complainant were against the action of the guards employed, there are no reasons given why the DB departed from this finding. Learned counsel for the applicant further submitted that there was no intention on the part of the applicant either to misappropriate the cheque or defrauding the respondent or with any other dishonest intention. Learned counsel referred to the case *In Re An Advocate & Solicitor* [1950] MLJ 113, where Thomson J in delivering the judgments of the court said at p 116:

… there is no finding that he did these things with the intention of misappropriating the money or defrauding the client or with any other dishonest intention. It may well be that it was open to the committee on the evidence before them to find that there was such an intention. They have not done so, and I am bound to assume that they had good reasons for not doing so.'

[12] There was no complaint by the respondent about the cheque being cleared. If the respondent's intention was not to pay the debit, he could countermand payment of the cheque but he has not done so. It was submitted that the DB was presumptive in concluding on that there was misconduct on the part of the applicant, in particular without finding as a fact that there was any dishonest intention on the part of the applicant in presenting the cheque for payment.

DISCIPLINARY BOARD'S SUBMISSION

[13] In reply, Dr Wong Kim Fatt representing the advocates and solicitors disciplinary board submitted that eventhough the report of the three member of the investigating tribunal dated 8 January 2008 found no misconduct on the part of the applicant and recommended that a formal investigating is not necessary but nevertheless the DB disagreed with that findings. The DB which consisted of 16 members, chaired by Tan Sri Dato' Seri Khalid Ahmad bin Sulaiman unanimously found misconduct on the part of the applicant and imposed a penalty of RM500. The maximum penalty provided under s 103 of the Act is RM5000.

[14] The DB's grounds of decision were sent to the applicant upon her request. These grounds are as follows:

The board was not satisfied with the respondent's explanation in that:

(i) she rejected the cheque from the complainant as settlement as her client had instructed her to do so and insisted on payment of costs as well; and

(ii) the respondent banked in the cheque thereafter as she was of the view that it was for the best interest of her client. The board found misconduct on the respondent's part particularly when she banked in the cheque after having rejected the same as settlement earlier and therefore fined her RM500'.

[15] Learned counsel further submitted that the 16 members DB was entirely correct in laws and on fact in arriving at its unanimous decision. The DB is said to be the best authority or body to decide what constitutes professional misconduct in a particular case. Learned counsel referred to the

case of *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341 (CA) and concluded that as a member of the honourable legal profession, the applicant should not conduct herself in a manner unbefitting of an advocate and solicitor or which brings or calculated to bring the legal profession into disrepute.

COURT FINDINGS

[16] Power of DB to take action against the applicant for misconduct in this case is governed by s 94(2) and (3) of the Act which reads:

94(1)…

(2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to be struck off the Roll or suspended from practice for any period not exceeding five years or ordered to pay or be reprimanded or censured, as the case may be.

(3) For the purposes of this Part, 'misconduct' means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) …

(h) …

(i) …

(j) …

(k) …

(l) …

(m) …

(n) …

(o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

It is the duty of the DB to decide whether the conduct of applicant in this case is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute. The court should be very slow in interfering with what had been decided by the DB except in a very exceptional cases only. In *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341, His Lordship Gopal Sri Ram JCA penned the following:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining on appeal in which the control question is whether particular conduct in unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior. We would, in this context, express our agreement with the following passage in the guide to the Professional Conduct of Solicitors issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:
>
> > One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.
>
> In our judgment, a court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

[17] By looking at the two letters of complaint from the respondent, to my mind it is obvious that there is some misconduct on the part of the applicant. Misconduct here is 'something which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency', (see *Re An Advocate and Solicitor* [1950] MLJ 113; [1949] 1 LNS 72). As stated in their order dated 15 May 2008, the DB before deciding that there was misconduct on the part of the applicant, took into consideration the respondent's letters of complaint, the decision of the investigating tribunal and the applicant representation at the hearing. Borrowing the words of Thomson J in *Re An Advocate and Solicitor*, 'it is not open to me at this stage to go behind the findings of fact of the disciplinary committee, I have to accept them'.

[18] On the issue that the DB should not deviate from the findings of the investigating tribunal as submitted by the applicant, this court totally

disagree. Section 102 of the Act which is applicable at that time before being deleted vide Act A 1269 with effect from 2 October 2006 provides as follows:

> 102(1) the investigating tribunal shall determine and recommend to the DB any one of the following recommendations:
>
> (a) that a formal investigating is not necessary;
>
> (b) …
>
> (2) if the investigating tribunal in its report recommends:
>
> (a) …
>
> (b) that a formal investigating by a disciplinary committee is not necessary, the DB may, if it disagrees with the recommendation, appoint a disciplinary committee.
>
> (3) …

[19] It is clear that the DB is not bound by the recommendation of the investigating tribunal (see *Wong Juan Swee v Law Society of Singapore* [1994] 3 SLR 846). Based on the complaint, the applicant's explanation and the report from the investigating tribunal, the DB found misconduct on the applicant's part particularly when she banked in the cheque after having rejected the same as settlement earlier. After perusing the records, this court have no ground to disagree with the DB's decision. In deciding whether an advocates and solicitors guilty for professional misconduct, 'both the bar council and the DB are required to balance the interest of the applicant with the interest of the public at large as well as the interest of the legal profession. Both the Bar Council and the DB owe a duty to protect and safeguard members of the public by maintaining a high standard of conduct amongst legal practitioners', (see *Marzaini Zainuddin v Majlis Peguam Malaysia* [2007] 8 MLJ 697; [2008]10 CLJ 339). Further, Your Lordship Abdul Malik Ishak J (as he then was) said in the same case:

> It goes without saying that the legal profession in this country must observe the highest possible standards of conduct. Nothing short of that would suffice. Disciplinary proceedings against recalcitrant advocates and solicitors are designed to enable members of the same profession to decide on the fate of their fellow practitioners. This is simply because members of the same profession should know and appreciate better than anyone else the standards of conduct expected of the legal profession. The DB, which consists of senior members of the Bar appointed under s 93(3) of the Act, thought it fit to suspend the appellant based on the evidence presented to them. The DB should know better. In the words of Raja Azlan Shah CJ (Malaya) in *Au Kong Weng v. Bar Committee, Pahang* [1980] 2 MLJ 89; [1980] 1 LNS 4 (FC):

> Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

[20] With regard to the applicant's contention that she was not given any specific charges before she attended meeting held by the DB, her complaint could not hold water. There is no requirement either under the Act or under the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 requiring charges to be framed against the applicant. The meeting of the DB cannot be taken as a trial by the court.

[21] On the issue that there was no dishonest intention on the part of the applicant, I would say that this point had been considered by the DB before they arrived at the decision. Dishonesty, of course, may be inferred from the surrounding circumstances and to establish dishonest, therefore, it is not necessary there was an intention to retain the cheque permanently. Here the applicant's action in rejecting the cheque as a settlement and later banking-in the same shows dishonest conduct on her part. She should not keep the cheque and banked-in later instead she should have returned the cheque to the complainant/respondent. The applicant was acting not in accordance to the standards of reasonable and honest counsel in that situation. The DB decided so in this particular circumstance of the case. In *R v Ghosh* [1982] All ER 689 (CA) where dishonestly was defined as:

> In determining whether a person has acted dishonestly a jury has first to decide whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest and secondly whether the accused person must have realised that what he was doing was, by those standards, dishonest. It is dishonest for a person to act in a way which he knows ordinary people consider to be dishonest, even if he feels morally justified in doing what he does.

The definition of 'dishonesty' can be found in s 24 of the Penal Code which says:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'.

Intention is, of course as I said earlier, can be inferred from the surrounding circumstances and not a matter of direct proof. Could such dishonest intention be inferred in this case? I am of the view that it can.

[22] For reasons stated above, I do not propose to disturb the order of the

A DB. Accordingly, I dismiss the applicant's appeal in encl 2 with costs to be paid by the applicant to the advocates and solicitors disciplinary board under s 108 of the Act.

Applicant's appeal dismissed with costs.

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Reported by Ashgar Ali Ali Mohamed

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